(8)

No. 95-5841

In The

Supreme Court of the United States

October Term, 1995

MICHAEL A. WHREN and JAMES L. BROWN,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONERS

A.J. KRAMER
Federal Public Defender
NEIL H. JAFFEE
LISA BURGET WRIGHT*
Asst. Federal Public Defenders
625 Indiana Avenue, N.W.
Suite 550
Washington, D.C. 20004
(202) 208-7500
Counsel for Petitioner Whren

G. ALLEN DALE
307 G Street, N.W.
Washington, D.C. 20001
(202) 638-2900
Counsel for Petitioner Brown

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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SUMMARY OF ARGUMENT

The government does not contest the fundamental premise of petitioners' argument – that *in the unique context of civil traffic regulations,* allowing mere observation of an infraction automatically to justify a stop places no effective limit on the discretion of the police. Such unbridled discretion is unacceptable under the Fourth Amendment. In other settings in which reliance on probable cause has been found impracticable, the Court has relied on compliance with standard procedures as an alternative safeguard against arbitrary searches and seizures. Although the Court has never before confronted the novel problem raised by this case (probable cause providing an inadequate check on officer discretion), it makes sense to turn to the same solution the Court has used to solve the analogous problem of how to limit discretion in those cases in which the Fourth Amendment balance "precludes insistence upon . . . individualized suspicion," *Delaware v. Prouse,* 440 U.S. 648, 654-655 (1979). By requiring the police to exercise their discretion in civil traffic enforcement pursuant to a consistent standard – set either by their own internal regulations or, at a minimum, by their own routine practices – the "reasonable officer would have" standard is a workable solution to a problem that undermines the privacy and security of every motorist in this country.

ARGUMENT

I. BECAUSE MERE OBSERVATION OF A CIVIL TRAFFIC INFRACTION DOES NOT LIMIT OFFICIAL DISCRETION IN DECIDING WHICH MOTORISTS TO SEIZE, THE FOURTH AMENDMENT'S REASONABLENESS REQUIREMENT COMPELS CONFORMANCE TO STANDARD POLICE PROCEDURES.

A. The Government Does Not Dispute That Pervasive Traffic Regulations Confer Unbridled Authority On Police And Create Opportunities For Pretextual Seizures.

The government does not dispute petitioners' description of the reality of traffic enforcement and, in particular, pretextual traffic enforcement. The government effectively concedes that the pervasiveness of minor civil traffic offenses (such as the "full time and attention" offense in this case) allows the police to establish "probable cause" of a "violation" by any motorist at any time (Pet. Br. 17-21). *See also Morrison v. Olson*, 487 U.S. 654, 727-728 (1988) (Scalia, J., dissenting) (" 'We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning' ") (quoting address by then-Attorney General Robert Jackson to Conference of United States Attorneys, April 1, 1940).

Nor does the government deny that the broad discretion conferred by civil traffic laws creates a temptation to use those laws as pretexts to evade Fourth Amendment requirements, that police routinely yield to that temptation, and that they do so disproportionately against racial minorities (Pet. Br. 21-29). Given the evidence set out in our opening brief, it is little wonder that "[t]here's a moving violation that many African-Americans know as

D.W.B.: Driving While Black." Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, The New Yorker 56, 59 (Oct. 23, 1995). *See also* Michael A. Fletcher, *Driven to Extremes: Black Men Take Steps to Avoid Police Stops*, The Washington Post, Mar. 28, 1996, at A1 (reporting inordinate numbers of traffic stops experienced by several prominent black men and their "strategy for dealing with DWB"). Unfortunately for the thousands of innocent motorists arbitrarily singled out for investigation, the hunches on which the police rely are overwhelmingly wrong (Pet. Br. 25 & n.21).

The government disputes none of this. The government merely argues that none of this matters – that probable cause is probable cause, and that "probable cause" *per se* equals "reasonable seizure," even if the probable cause is of a minor civil traffic infraction for which a reasonable officer would not make a seizure. Far from denying that pretextual traffic stops are epidemic, the government argues that they are a *good* thing (Govt. Br. 23, 25):

> [I]t is not necessarily improper for officers, in deciding which traffic offenders to stop, to take into account "collateral" (Br. 38) law enforcement objectives beyond the fact that an offense has been committed. . . . On the contrary, it would be unreasonable to forbid a police department from focusing its finite resources disproportionately on those observed traffic offenders whom officers in the field suspect may also be engaged in more serious offenses.

The government's analogy to prosecutorial discretion (Govt. Br. 24 n.11) is misplaced. The government argues that this Court has upheld charging decisions as long as the prosecutor has probable cause and the decision was not based on constitutionally impermissible factors such as race or religion. But the government overlooks that when police

officers make seizures, they are subject to an additional constitutional constraint not applicable to prosecutors: the Fourth Amendment requirement of "reasonableness."

The government's argument that "in deciding which valid searches, seizures, or arrests to undertake and which to forgo, officers routinely consider . . . legitimate 'collateral' factors" (Govt. Br. 24) begs the very question in this case: whether the police have a "valid" basis for action where a reasonable officer in the same circumstances would not act on that basis. If the floor for establishing a "valid" ground to stop is set so low that it includes grounds upon which a reasonable officer would not rely, the independently inadequate (and thus *illegitimate*) "collateral" motive becomes, objectively viewed, the operative reason for a stop that would not otherwise have been made by a reasonable officer. The government not only rejects inquiry into the subjectively pretextual motives of individual officers in particular cases (as do petitioners), but also seeks endorsement of a patently sham system that affirmatively encourages *objectively pretextual* traffic stops.[1]

The government advocates complete police discretion within "the universe of searches, seizures, and arrests for which probable cause or reasonable suspicion exists" (Govt. Br. 23), while not disputing that, in the unique context of civil traffic regulations, that "universe"

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[1] Petitioners agree that courts should not inquire into whether a particular officer's actions were subjectively "pretextual" (Govt. Br. 13-16). But the "reasonable officer would have" standard allows courts to find police action "objectively pretextual" in the same sense this Court has recognized that courts can find an officer's action to have been undertaken in "*objective* 'good faith,' " *Graham v. Connor*, 490 U.S. 386, 399 n.12 (1989) (citing *Anderson v. Creighton*, 483 U.S. 635 (1987)).

includes all motorists. In asking this Court to endorse a system whereby police focus on those "observed traffic offenders" the police "suspect" may be involved in criminal activity (Govt. Br. 25), the government is really asking the Court to allow officers to play their hunches against everyone who gets behind the wheel. This Court's decision in *Prouse* says that is impermissible.

B. Requiring Conformance To Standard Procedures Is An Appropriate Alternative Means Of Constraining Police Discretion In These Unique Circumstances.

The government acknowledges that this Court has in some cases "required police conduct to conform to internal standards or routines to satisfy the Fourth Amendment" (Govt. Br. 8) and that the application of standard procedures in those settings "avoids the risk of arbitrary police action" (Govt. Br. 17). The government argues, however, that such conformance has been required only as an alternative to a showing of individualized suspicion, never as an addition to probable cause or reasonable suspicion (Govt. Br. 8, 16-17). But if "a showing of individualized suspicion is not a constitutional floor, below which a search or seizure must be presumed unreasonable," *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 624 (1989), neither is it a floor *above* which a search or seizure must be presumed reasonable. The Court's decisions in *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Winston v. Lee*, 470 U.S. 753 (1985), confirm that probable cause alone does not necessarily make a search or seizure objectively reasonable.

The ultimate constitutional question – objective reasonableness – "depends ' "on a balance between the public interest and the individual's right to personal security

free from arbitrary interference by law officers." ' " *Brown v. Texas*, 443 U.S. 47, 50 (1979) (citations omitted). A "central concern" in striking this balance "has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Id.* at 51.

> To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.

Id. The government emphasizes the "or" and argues that because the first requirement is met here, there is no basis for imposing the second (Govt. Br. 17). However, observation of a civil traffic infraction does not *automatically* establish "that society's legitimate interests require the seizure of the particular individual" (*Brown*, 443 U.S. at 51). Indeed, because such offenses can be detected in the conduct of just about everyone, they do not in fact identify those "particular individual[s]" whose seizure is "require[d]" by society's interests.[2] It is therefore consistent with Fourth Amendment precedent to turn to this Court's alternative means of constraining discretion –

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[2] The traffic regulations relied upon by the police in this case were promulgated not to define criminal conduct, but as part of a scheme designed to regulate in hypertechnical detail every conceivable aspect of motor vehicle use in the District of Columbia. It is therefore not surprising that, when combined with the traditional criminal probable cause standard, they confer a degree of discretion far beyond that normally available to the police in enforcing the criminal laws.

requiring compliance with "standardized criteria" or "established routine," *Florida v. Wells*, 495 U.S. 1, 4 (1990).

Conceptually, this case is analogous to the "special needs" cases. Where the government has shown "special needs, beyond the normal need for law enforcement," this Court has dispensed with the probable cause requirement if the balance of government and privacy interests shows it to be "impracticable." *Skinner*, 489 U.S. at 619.

> In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.

Id. at 624. This case presents the reverse situation: the sweeping discretion available to police under the civil traffic code and the documented use of that discretion to make pretextual seizures makes probable cause an impracticable means of guaranteeing an objectively reasonable seizure. *Cf. South Dakota v. Opperman*, 428 U.S. 364, 370 n.5 (1976) (probable cause "unhelpful" in inventory context because "[t]he standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures"). The governmental interest in the seizures at issue is minimal (since, by definition, the "reasonable officer would have" test addresses only those infractions the government does not normally act upon) and the important privacy interest in avoiding arbitrary seizures is placed in jeopardy by reliance on probable cause alone. Although the problem is different than in the Court's "special needs" cases, the solution is the same:

reliance on standard procedures to ensure against arbitrary exercise of official discretion.[3]

C. The Government's Proposed Solutions To The Pretextual Traffic Stop Problem Are Ineffective.

1. The Equal Protection Clause

The government's reliance on the Equal Protection Clause as the answer to the pretextual traffic stop problem is misplaced. First, of course, the fact that an "unreasonable" police seizure might in some circumstances violate the Equal Protection Clause does not mean it does not also violate the Fourth Amendment.

Second, the Equal Protection Clause cannot be relied upon to curb the systemic abuses petitioners have documented. *See generally* 2 W. LaFave & J. Israel, *Criminal Procedure* § 13.4 at 185-203 (1984) (discussing heavy burden facing discriminatory enforcement claimants and problems of proof in establishing such a claim under Equal Protection Clause). An equal protection claim in the selective traffic enforcement setting would require determination of the very subjective intent of the officer

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[3] The government understates the importance of *Abel v. United States*, 362 U.S. 217 (1960), in pointing the way to such a solution. *Abel* is highly significant because, in the face of a claim that an administrative power was being used as a pretext for criminal law enforcement, and *despite the existence of individualized suspicion that Abel was a deportable alien*, this Court "focus[ed] . . . on the regularity of procedures" (Govt. Br. 20) in upholding the agency action. Likewise, this Court's reliance on the absence of any "departure from established police department practice" in putting aside the pretext claim in *United States v. Robinson*, 414 U.S. 218, 221 n.1 (1973), is significant given that the police clearly had probable cause of a *criminal* violation in that case.

that the government agrees is so difficult to establish (Govt. Br. 31 & n.16). Any individual motorist, such as the priest stopped on the New Jersey Turnpike (*see* Pet. Br. 47), might have a "gut instinct" that his race played a role in his stop, but would be hard-pressed to gather even the minimal amount of information needed under FED. R. CIV. P. 11 to file a complaint. Even if the claim survived Rule 11, the kind of data required to prove intentional discrimination is not generally available. *See United States v. Travis*, 62 F.3d 170, 175 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 738 (1996).

In sum, even if the scope of the Equal Protection Clause were relevant in determining what is "reasonable" under the Fourth Amendment, it cannot be counted on to deter the kind of arbitrary traffic enforcement policies encouraged by the "could have" test. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), has been on the books for over 100 years but, as the evidence in our opening brief shows, it has obviously had little, if any, impact on traffic stops. Application of the traditional *Terry*-type "reasonable officer" standard, on the other hand, would go a long way toward deterring officers who are inclined to use the civil traffic code to play out their subjective hunches against motorists whose conduct would not normally result in an intrusion.

2. The "Scope" of Traffic Stops

The government suggests that because "'"the stop and inquiry must be reasonably related in scope to the justification for their initiation"'" (Govt. Br. 27) (quoting *Terry v. Ohio*, 392 U.S. 1, 29 (1968)), there is no need to restrict the authority to make a traffic stop to those a reasonable officer would have made. But whatever the Fourth Amendment limits on the scope of the intrusion

following a stop for a traffic violation may be, they cannot undo the harm to a motorist's privacy interests caused by the stop itself. This Court in *Prouse* held that a traffic stop is a significant enough intrusion that it cannot be made at the unfettered discretion of officers in the field.

Moreover, any limits this Court has placed on the scope of a *Terry* stop are not relevant since most traffic stops are made upon an observed infraction and are not investigatory *Terry* stops. A "traffic stop supported by probable cause" may "exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop." *Berkemer v. McCarty*, 468 U.S. 420, 439 n.29 (1984). The scope of a traffic stop is broad enough, in any event, to provide plenty of incentive for pretextual stops. At a minimum, a legitimate traffic stop includes detention of the motorist for a reasonable period "while the officer checks his license and registration." *Id.* at 437. Assuming the stop itself is valid, an officer will always be free to use the time he is waiting for a response from dispatch to request consent to search, or to subject the motorist and his car to a sniff by a drug-sniffing dog, without exceeding the "scope" of the stop. In a recent Sixth Circuit case, an Ohio State Highway Patrol Trooper "testified that as part of his drug interdiction unit's investigative method, he 'automatically' uses [his dog] to perform a narcotics sniff on every vehicle his unit stops." *United States v. Buchanon*, 72 F.3d 1217, 1228 (6th Cir. 1995).

3. Recourse To The Political Branches

The government suggests that petitioners' claim for relief from the excessive discretion conferred on police under the civil traffic code should be "addressed to the political branches" (Govt. Br. 9, 29). But this Court has

never hesitated to impose a judicial remedy when a legislature has vested excessive discretion in the hands of the police. *See Kolender v. Lawson*, 461 U.S. 352 (1983) (loitering statute unconstitutionally vague under Due Process Clause). Fourth Amendment limits are not defined by the political branches. The political solution would make sense only if, contrary to society's expectations, the technical traffic regulations that create the pretext problem were strictly enforced across the board. But, by definition, the "would have" test addresses stops for violations that reasonable officers would generally ignore. It is precisely because the political majority cannot be counted on to resist overinclusive laws that are enforced only against the *few* that the problem of arbitrary enforcement requires a judicial remedy. "[N]othing opens the door to arbitrary action so effectively as to allow [municipal] officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

II. THE "REASONABLE OFFICER WOULD HAVE" INQUIRY IS THE SAME WORKABLE STANDARD ROUTINELY APPLIED BY TRIAL JUDGES UNDER *TERRY V. OHIO*.

The government argues that the "would have" test is "unworkable" (Govt. Br. 9-10, 29-38). But the inquiry petitioners propose is no different from that made every day by judges facing Fourth Amendment challenges to *Terry* stops: "[W]ould the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was

appropriate?" *Terry*, 392 U.S. at 21-22. *See United States v. Botero-Ospina*, 71 F.3d 783, 790 (10th Cir. 1995) (*en banc*) (Seymour, C.J., dissenting), *petition for cert. pending*, No. 95-8121 (filed Mar. 1, 1996); *id.* at 796 (Lucero, J., dissenting).

This Court has always accepted that " '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.' " *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citation omitted). "What is reasonable . . . 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.' " *Skinner*, 489 U.S. at 619 (citation omitted). A test that asks whether a reasonable officer in the circumstances would have taken a particular action is no more "unworkable" than other "reasonable officer" inquiries prescribed by this Court. *See Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (scope of consent is determined by asking "whether it is reasonable for an officer to consider a suspect's [statements of consent] to include consent to [make the search at issue]"); *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (qualified immunity depends on "whether the actions [allegedly] taken are actions that a reasonable officer could have believed lawful"); *Illinois v. Krull*, 480 U.S. 340, 355 (1987) (asking whether "reasonable officer should have known that the statute was unconstitutional"); *United States v. Leon*, 468 U.S. 897, 919-920 (1984) ("where the officer's conduct is objectively reasonable, ' . . . the officer is acting as a reasonable officer would and should act in similar circumstances.' ") (citation omitted).

A. As Always, The "Reasonable Officer" Is A Reasonable Officer In The Circumstances Of The Officer Who Made The Intrusion.

The government suggests that even if the policy and practice of the police are relevant, there is no reason for the reference point to be officers in the circumstances of Officers Soto and Littlejohn, *i.e.*, out of uniform and in unmarked cars, rather than "the entire police force" (Govt. Br. 36-37). But Fourth Amendment reasonableness depends on an "objective assessment of the officer's actions in light of the facts and circumstances *confronting him at the time.*" *Scott v. United States*, 436 U.S. 128, 136 (1978) (emphasis added). Petitioners' test therefore asks whether a reasonable officer *in the circumstances of the officer who made the stop* would have made it, not whether a reasonable officer in some other hypothetical circumstances theoretically could have made the stop. In *Graham*, 490 U.S. at 396, this Court made clear that "[t]he reasonableness of a particular use of force [under the Fourth Amendment] must be judged *from the perspective of a reasonable officer on the scene . . . .* " (emphasis added). The "man of reasonable caution" considered in *Terry*, 392 U.S. at 22, is a prudent police officer in the shoes of the officer making the search or seizure. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975). Likewise, the classic "reasonable person" in tort law means a reasonable person with the same physical attributes and professional knowledge and experience as the defendant. *See* W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, *Prosser and Keeton on Torts* § 32 at 175-176, 185 (5th ed. 1984).[4]

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[4] The government attempts to shift this Court's focus from the fact that this seizure was made with an unmarked car by

B. The "Reasonable Officer" Standard Will Not Hinder Traffic Enforcement By Officers In The Field.

The government argues that the "would have" test will confuse officers in the field, whose "split-second" decisions (Govt. Br. 9, 33) will be hindered by uncertainty as to whether a court would later find that a reasonable officer would have made a particular traffic stop on the basis asserted.

First, under the "reasonable officer would have" test, any officer who witnesses a traffic violation that he genuinely believes warrants enforcement action will not have to think even a moment about the constitutionality of stopping the motorist's car. It would be the truly rare case in which a traffic stop that was in fact motivated by

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urging the Court to separate the *manner* in which this seizure was made from the seizure itself (Govt. Br. 18 n.7, 39-41 & n.19). But "the question is 'whether the totality of the circumstances justifie[s] a particular sort of . . . seizure.' " *Graham*, 490 U.S. at 396 (quoting *Garner*, 471 U.S. at 8-9). Likewise, the government's attempt to dismiss the unmarked car regulation as "merely allocat[ing] enforcement duties among different officers" (Govt. Br. 37) fails. The regulation at issue in fact withdraws *authority* to enforce from officers out of uniform or in unmarked cars except in the most exigent of circumstances. The safety concerns behind this regulation are apparent. *Cf.* U.S. Dept. of Transportation, *A Manual of Model Police Traffic Services – Policies and Procedures* § 2.5 at 109-110 (Jan. 1986) (model regulations of International Association of Chiefs of Police allow use of unmarked cars for traffic enforcement only if specifically authorized in connection with "special enforcement needs" and if "equipped with both emergency lights and siren"). The unmarked car that stopped the Pathfinder in this case was not equipped with any emergency lights or sirens (Tr. 177-178).

traffic concerns would fail the "would have" test.[5] Only an officer using a minor traffic infraction as a pretext to investigate some subjective hunch would have to ask himself what a reasonable officer would do in light of the facts and circumstances confronting him – an inquiry no different from that necessary in every *Terry* stop. Since such an officer has already gone through the rather complex mental process of realizing he has a hunch that does not meet the *Terry* test, and deciding to look for a traffic infraction to provide Fourth Amendment justification for a stop, the government can hardly criticize the "would have" test on the ground that it " 'complicat[es] the thought processes . . . of police officers' " (Govt. Br. 33) (quoting *New York v. Quarles*, 467 U.S. 649, 659 (1984)).[6]

Second, application of the exclusionary rule in these circumstances does not risk "overdeterring officers from responding to observed offenses" (Govt. Br. 38). An officer making an ordinary traffic stop would have no concern with the exclusionary rule because he would not expect it to yield the kind of "fruit" that he would want

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[5] It is *theoretically* possible that an "unreasonable" but well-intentioned police officer could make a stop for traffic-related reasons that deviated sufficiently from the enforcement practices of his department that it would fail the "reasonable officer would have" test. This should not trouble the Court. Subjective good faith has never been determinative of reasonableness. *Graham*, 490 U.S. at 397; *Terry*, 392 U.S. at 22.

[6] The government is unnecessarily alarmist when it suggests that petitioners' test would somehow prevent officers from "'follow[ing] their legitimate instincts when confronting situations presenting a danger to the public safety.' " *Id.* Clearly, *any* traffic violation "presenting a danger to the public safety" as this Court used that phrase in *Quarles*, would objectively justify a traffic stop under the "would have" test, no matter what the officer's actual motivation.

to use in court; having witnessed the infraction, the officer already has all the evidence he needs to obtain a civil adjudication. Therefore, the only officers the exclusionary rule would "deter" would be those improperly using the traffic laws to make stops that would not normally be made but in which the officer has a subjective hope of finding evidence of crime. This Court has repeatedly condemned such pretextual government action (*see* Pet. Br. 30, 33-34) and should not hesitate to adopt a standard that will deter it. *See* Govt. Br. 21 n.10 (acknowledging that "th[e] rule [in *Steagald v. United States*, 451 U.S. 204 (1981)] was adopted in part to eliminate the possibility of pretextual use of an arrest warrant").

C. The "Reasonable Officer" Standard Will Encourage Police Rulemaking.

The government is wrong that, under a "reasonable officer would have" standard, police departments "would be well-advised to dispense with internal prohibitions on enforcement altogether" (Govt. Br. 32). Under the "reasonable officer would have" standard, the choice for police departments is not between having every stop upheld if they do not adopt regulations, and having some stops struck down if they do adopt regulations. Because of the inherently selective nature of traffic law enforcement, individual officers will always make *some* arbitrary stops in the absence of regulations guiding their discretion. Discretion-limiting regulations, however, avoid *ad hoc* judicial inquiries into police practices and make stops undertaken in conformance with such regulations presumptively reasonable. Moreover, such regulations actually reduce the number of unreasonable stops by giving officers concrete standards to help them exercise their discretion. Therefore, under a "reasonable officer would

have" standard, police departments will have an incentive to engage in the sort of self-regulation this Court has recognized as desirable. *See United States v. Caceres*, 440 U.S. 741, 755 & n.23 (1979).[7] *See also* Kenneth Culp Davis, *Police Discretion* (1975).

D. The "Reasonable Officer" Standard Will Not Be Cumbersome To Apply.

The government argues that, absent a police regulation to guide the "reasonable officer" inquiry, a court seeking to determine what reasonable conduct would be for an officer in the stopping officer's circumstances "would either have to rely on the court's own notions of whether enforcement of a particular infraction would be reasonable, or receive testimony from other officers as to their usual practices with regard to the offense" (Govt. Br.

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[7] The holding in *Caceres* has no applicability to this case. In *Caceres*, this Court made clear that the defendants had *no reasonable expectation of privacy* in the conversations being recorded in violation of IRS regulations. 440 U.S. at 750. Therefore, the Fourth Amendment reasonableness requirement was simply not implicated. Indeed, the Court found that the particular violations at issue did "not raise *any* constitutional questions." *Id.* at 750-751 (emphasis added). The *Caceres* Court merely rejected "a rigid application of an exclusionary rule to every [police or prosecutorial] regulatory violation." *Id.* at 755. The Court never suggested that violation of a police regulation would not be relevant to the "reasonableness" of police conduct under the Fourth Amendment. Petitioners do not contend that the violation of a regulation will always be dispositive of the reasonableness inquiry. The "would have" standard permits any traffic stop a reasonable officer would have made. All of the circumstances, including "vague or general" department policies (Govt. Br. 33), will be viewed through the eyes of a reasonable officer on the scene, not "with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396.

31). The government exaggerates the difficulties of such an inquiry.

First, even if some lower courts purporting to apply the "reasonable officer would have" test have not always done so consistently, and have, on occasion, slipped into a consideration of the subjective motives of the individual officer (Govt. Br. 34-35), that does not mean that the standard itself is inherently unworkable. There is no reason to believe that, with proper guidance from this Court, lower courts cannot consistently and objectively apply a traditional "reasonable officer" standard in this context.

Second, it is not unrealistic to expect that a court will be able to develop the facts necessary to apply the "reasonable officer would have" standard in the course of an ordinary suppression hearing. The officer who made the stop is competent to testify to any relevant written or oral policies.[8] He is also competent to testify as to his own practice in similar circumstances, and that of others to the extent he knows it. It is a simple matter to ask the officer how often he sees a car, for example, exceed the speed limit by two miles per hour under similar conditions, and how often he stops such cars. If the officer sees 100 such violations per day but has stopped only two motorists for that violation in the past month, the court will probably not require any additional information. The government

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[8] In the District of Columbia, for example, District Commanders must consult with the Commanding Officer of the Traffic Enforcement Branch to develop selective enforcement policies for their districts, which are then implemented by the patrol officers. MPD General Order 303.1(I)(A)(1)(f-g), (III)(A)(1) & (III)(B)(5) (Pet. Br. Add. 4, 29-30). Thirty percent of all MPD roll call training must be traffic enforcement related. MPD General Order 303.1(III)(B)(8) (Pet. Br. Add. 30).

will always be free to submit evidence, if it can, that the stopping officer's practice is unrepresentative and that reasonable officers are trained to, and do in fact, routinely stop motorists under similar circumstances. If the stopping officer testifies that the stop was consistent with his standard practice and that of others, absent a contrary departmental policy, that will presumably be the end of the matter unless there is evidence that the officer's claimed practice is not representative.

Petitioners submit that the vast majority of traffic stops will easily pass the "reasonable officer would have" standard and that judges will be able to spot those few unreasonable stops in which the police have arbitrarily deviated from standard procedure. Here, for example, MPD regulations affirmatively prohibited the officers who stopped petitioners' car from taking such enforcement action.[9] Moreover, even aside from the written procedures, Officer Soto candidly acknowledged that as a vice officer on plainclothes patrol, he stops drivers for traffic infractions "[n]ot very often at all" (Pet. Br. 7

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[9] The government is plainly wrong in suggesting (Govt. Br. 38) that a reasonable officer could have thought the Pathfinder's violations were "so grave as to pose an *immediate threat* to the safety of others" so as to permit enforcement action under MPD General Order 303.1(I)(A)(2)(a)(4) (Pet. Br. Add. 4) (emphasis in original). First, the infractions did not occur "at night" (Govt. Br. 38). Officer Soto testified at the preliminary hearing that it was "still light" (6/16/93 Tr. 8). Second, as described by Officer Soto himself, these infractions were not of a type that "would somehow endanger the safety of anybody" (Pet. Br. 7 (quoting Tr. 72-73)). *See also* MPD General Order 303.1(I)(A)(1)(e) (Pet. Br. Add. 3) (department policy even with respect to officers on regular patrol is "[t]o target enforcement activities against those committing *hazardous* violations") (emphasis added).

(quoting Tr. 78)). The record establishes the objective unreasonableness of this stop.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Brief for the Petitioners, the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed, and the case should be remanded for entry of an order vacating petitioners' convictions and suppressing all evidence obtained as a result of the unconstitutional seizure in this case.

Respectfully submitted,

A.J. KRAMER
Federal Public Defender
NEIL H. JAFFEE
LISA BURGET WRIGHT*
Asst. Federal Public Defenders
625 Indiana Avenue, N.W.
Suite 550
Washington, D.C. 20004
(202) 208-7500
Counsel for Petitioner Whren

G. ALLEN DALE
307 G Street, N.W.
Washington, D.C. 20001
(202) 638-2900
Counsel for Petitioner Brown

**Counsel of Record*

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